SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 60

JOSEPH WHITE MUSSER, GUY H. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,
Appellants,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

SUPPLEMENTAL BRIEF OF APPELLANTS

CLAUDE T. BARNES,
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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

With deep humility counsel accepts the suggestions Mr. Justice Jackson made at the oral argument of this case, to the effect that the Utah statute behind this prosecution is so broad as to condemn almost every human action

hence the defendants could not have known of a law prohibiting that which they are alleged to have done. Incidentally it is noted with admiration and respect, how this highest Court of the land is as solicitous of the Constitutional rights of the lowly and the down-trodden as of the mighty and strong, and how it takes it upon itself to see that justice is done. Counsel, therefore, formally moves the reversal of the judgment in this case on the ground that the section of the Utah statute on which it is based is repugnant to the Constitution of the United States; and if such motion be granted, it appears to him, that a decision of the other points involved will not be necessary.

1.

Although the information in this case is admittedly drawn alone on Section 5, we set forth the Utah conspiracy statute (Sec. 103-11-1, Utah Code 1943) in its entirety:

"103-11-1. Criminal Conspiracy Defined. If two or more persons conspire:

(1) To commit a crime; or

(2) Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or,

(3) Falsely to move or maintain any suit, action or proceeding; or,

(4) To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or,

(5) *To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due ad-*

> *ministration of the laws;*—they are punishable by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000."

We have italicized the subsection on which this information is founded, as admitted (Resp. Brief, p. 4) herein.

The information (Trans. of Record, 1) was based on the alleged fact that the defendants conspired "to commit acts injurious to public morals" hence its constitutionality must rest entirely on section 5, which, thusly reduced becomes the following:

> "If two or more persons conspire: . . . (5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws;—they are punishable", etc.

Bear in mind there was no evidence in this case of the commission of any crime known to the law, as a result of the alleged conspiracy; the judge took all such from the consideration of the jury (Trans. of R., p. 7), and all that remained was whether the advocacy of plural marriage as a religious doctrine is "injurious to public morals", and itself a crime.

Prior to their arrest therefore the defendants had only the vague law cited supra concerning "any act" injurious to the public health, to public morals" to guide them in what they might say. There is no law in Utah against the advocacy of plural marriage as a religious doctrine.

When Mr. Justice Jackson spoke his query, it occurred to the writer that, the particular brand of cigars the au-

thor smokes makes him husky before the Supreme Court, anything that husks a man must be injurious to his health, hence under the statute the two people in Utah who conspired to give the writer a box of cigars before he left for Washington should be sent to jail for a year each. In the same line of reasoning, in the Pullman where much of this is pondered, the waiters of the dining car who conspire to prevail upon the writer to eat three heavy meals a day are committing an act injurious to his health, hence, they should serve a year's time for so doing. It all by such a *reductio ad absurdum* illustrates how meaningless and absurd the Utah statute is, when it prohibits *any* act against health and morals Such a statute—that section—should not exist in the law books of any state, for it makes the daily acts of ordinary people amenable to the whims of prosecuting attorneys.

In Washington, D. C., I notice on public busses a sign that reads:

"It's the law—do not stand in front of the white line."

Everyone knows what the white line is.

Suppose on entering Utah travelers were confronted by a sign:

"It's the law—do not do any act injurious to public health, morals, trade, commerce."

The tourist would say: "Let's turn back", and he would least expect that the thing might apply to his very words!

It amounts in effect to a sign reading:

"It's the law—do not do any act."

Even a child would inquire: "What?".

The word "any" means (Standard Dict.): "One indefinitely and indifferently". In laws we often come upon the words, "Any person", because laws are applicable to all the people alike; but when the word "any" is used as a modifier of the word "act" the word "act" is so infinitely various in its application that it becomes meaningless and incongruous.

I may say that when a year ago I argued "White Slave Act" cases before this Court (Cleveland v. U. S., 67 S. Ct. 13), I was greatly concerned with the words "any other immoral purpose"; but in those cases there were preceding words through which the doctrine of *ejusdem generis* could be invoked. There is no such here. Section 5 of the Utah law herein considered is supposed of itself to give another or separate definition of conspiracy, and it has no relation to the other sections on obtaining money by false pretenses or the like. *Ejusdem generis*, therefore, is inapplicable, and I bring it up only because I am trying to anticipate anything that might occur to one defending this clearly unconstitutional statute.

Suppose it be argued, that in the interpretation of a criminal statute one is supposed to use common sense and deduce by his own reasoning precisely what the legislature intended. That does not aid us here, for even lawyers, who in their highest expression exemplify reasoning more than the mere recital of precedent, would hardly conclude that the words under consideration had any application to free speech.

Again, suppose it be contended, that everyone knows what is "any act injurious to public morals", I am re-

minded of the Latin phrase—*ignotum per ignotius*, which I believe refers to a thing unknown by a thing more unknown. If "any act" be beyond our comprehension as defining the culpable certainly the words "public morals" are beyond my power of definition. I argued this point *in extenso* in my briefs in the Cleveland cases (*sit supra*), and where ethical philosophers disagree certainly a mere legist like myself fears to tread. Hence if opposing counsel were to argue that the ordinary citizen would know what the Utah statute attempts to condemn, and precisely condemn, let us say, then I must remonstrate in behalf of us ordinary humans.

2.

Let us transport the foregoing to a precise holding, again, let us say, with sincere acknowledgment of the prompting of this Court. In the important, controlling case of United States v. L. Cohen Grocery Co. (1921), 255 U. S. 81, the point was, whether the provisions of the Lever Act (Food Control Act) were so broad and uncertain as to be repugnant to the Fifth and Sixth Amendments requiring due process and information of the nature and origin of an accusation.

The Lever Act used the word "any" very freely in making it unlawful for "any" person to destroy "any" necessaries; to commit waste of "any" necessaries; "to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" and so on, or to conspire with others to do so. The Cohen Co. sold sugar in St. Louis at what was alleged to be a rate in violation of the statute. A

demurrer was successful below and the government took a direct appeal to the Supreme Court of the United States. The lower court had said:

> "the law vague, indefinite and uncertain, and because it fixes no immuntable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against it, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

Mr. Chief Justice White delivered the opinion of this highest Court, saying in part:

> "The mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing on." . . . "The sole remaining inquiry, therefore, is the certainty or uncertainty, of the text in question, that is, whether the words 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open,

therefore, the widest conceivable inquiry, the scope of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us." . . .

I ask the court merely to reread the foregoing sentence by sentence, with the wording of the Utah statute in mind —"any act injurious to the public health, to public morals". The answer must be irrefutable.

That the foregoing is generally accepted law is apparent from the following two paragraphs from Sutherland:

"Since the state makes the laws, they should be most strictly construed against it; to establish a certain rule under which mankind may be safe from the arbitrary discretion of the judge; that it is reasonable for penal statutes to be construed so that they will be required to give 'fair warning' of what the law intends to do if a certain line is passed."

Sutherland, "Statutory Construction", Vol. 3, § 5604 (3rd Ed.)

"The words of the criminal statute must be such as to leave no reasonable doubt as to the intention of the legislature, and where such doubt exists the liberty of the citizens is favored."

Sutherland (*cit. loc.*) § 5605.

3.

Nothwithstanding the suggestion of the Court herein I am now constrained to launch an inquiry into whether or not my clients are entitled to take advantage of its beneficence; and the first wave encountered is the applicability to the states of the right to be informed, of the nature of an accusation against oneself. The Cohen case above detailed involved the interpretation of a Federal statute in a Federal Court, resulting in a direct appeal by the government to this lofty tribunal. The case at hand involves a state statute with an appeal from the highest Court of that state to the same ultimate judiciary.

Let us assume, that by the Fay Foster and Adamson cases (all recently reported in Vol. 67 S. Ct. Reporter) the cherished hopes of many of us, that all of the first eight amendments were carried over into the Fourteenth, have been denied. Where does that leave me floating as counsel for these bestricken men?

Here and there a log of refuge appears:

Mr. Justice Jackson (Fay case, 67 S. Ct. 1613):

> The Fourteenth Amendment "prohibits prejudicial disparities before the law." It is "the function of this federal court under the Fourteenth Amendment . . . to protect the integrity of the trial process by whatever method the state sees fit to employ."

Mr. Justice Reed (Adamson v. People, 67 S. Ct. 1672):

> "A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment."

Mr. Justice Frankfurter (Adamson *cit. supra*):

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."
>
> (In Foster v. People, 67 S. Ct., 1716) "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice . . . It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule. . . . But process of law in order to be 'due' does require that a state give a defendant ample opportunity to meet an accusation."

En passant I might ask Mr. Justice Frankfurter how a defendant can "meet an accusation" when the statute on which it is founded cannot lead an intelligent man to foreknow that he might be so charged; but—I must not assume that he with whom I have often crossed oars is not on this occasion actually coming to my rescue.

Again Mr. Justice Frankfurter in Foster (*cit supra*):

> The Fourteenth Amendment guards against: "An ingredient of unfairness", "a deprivation of rights essential to a fair hearing", the "miscarriage of Justice", and protects "rights essential to a fair hearing."

Not to be informed of the origin of an accusation and of the fundamental law upon which it is based is a de-

nial of not only due process but also the basic constitutional conceptions of our government.

To illustrate as best I may *extempore* and in the fleeting hours of a passage home:

A state enacts a law to the effect that "it is unlawful to commit Blank". The judge and jury are left to determine what Blank is. Again: "it is unlawful for two or more persons to conspire to commit Blank." You ask, so do I, what in the world is Blank, likewise these defendants ask what is "any act against public health or morals?" We therefore must admit, that to convict one of Blank is to deny him the protection of the very government under which he was born.

Consonant with the foregoing this Court said in Buchalter v. New York (1943), 319 U. S. 427:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.'"

It is our opinion, written as it were *in transitu*, that one of the most "fundamental principles of liberty and justice" is, that laws shall clearly define that which is wrong; otherwise we are to become victims of judicial caprice, if, indeed, not also political or sectarian revenge.

4.

The final obstruction ahead of our rescued boat is the query: Have defendants waived the point by not arguing

it? We are convinced, however, that in a criminal case with an unconstitutionality as patent as this one the Court *sua sponte* may not only raise the question but act upon it at any stage of the proceedings. These are not the only defendants who might be enmeshed by the Utah conspiracy law with its infinite capabilities of distressing and humiliating innocent people. Goodness knows what an ardent county attorney and an equally misguided judge might determine to be an act against public health or morals. As shown in the footnote of the Cohen case *supra* numerous courts attempted in *extremis* to justify the word "any" and determine a workable criterian therefrom; but without success. If learned Federal judges could not make sense of the word "any" neither can we here.

The defendants herein filed not only a motion to quash in the nature of a general demurrer (Tran. of R., p. 3), but also a motion to dismiss (Tr. R., p. 4), based on the First and the Fourteenth Amendments to the Constitution of the United States.

I believe this to be a statement of what the law either is or ought to be: (a) Unlike civil rules and regulations criminal laws and their interpretation are of intense interest to citizens of the United States generally; (b) the courts should be the constant guardians of the rights of the people; (c) if a criminal law be a nullity by reason of its obvious unconstitutionality counsel for defendants jeopardized under that law may not be permitted to waive its unconstitutionality for the reason that precedents though erroneous take dangerous hold and the public should not be afflicted by one man's waiver of their obvious right; (d) in criminal cases, therefore, it is not only

the privilege of courts but also their duty to indicate unconstitutionality, not, let us say, for the particular defendants, but for the public (e) unconstitutionality, which is the equivalent of nullity, may be suggested in criminal cases at any time, even by way of final gasp in a petition for rehearing.

Since this is the first brief counsel has written in reliance almost entirely on his conception of the basic philosophy of the law it is not weighted with precedents; but he did have time to glimpse the following:

> "In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the provinces of individual consent or agreement."
>
> Cooley's "Constitutional Limitations", (8th Ed.), Vol. 1, p. 371.

The following note occurs on the same page:

> "When a case involves the punishment of a defendant for a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings. Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 L. R. A. (N. S.) 799, 11 Ann. Cas. 514; Ex parte Lewis, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929."
>
> "A constitutional objection to a criminal statute may be raised on a petition for a rehearing, even though it had not been raised either upon the trial or upon the original appeal. State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916 D. 140."

Since these adumbrations will be air-mailed en route and printed without proof-reading, counsel hopes that the Court will be tolerant of any deficiencies that might eventually appear; nevertheless, awkward though his presentation be, he is convinced that this case must be reversed on the belated point of unconstitutionality alone. Experience is a great teacher, but it is not always free from abasement.

Respectfully submitted,

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